

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANIEL ROBERT AYLWARD,

Defendant-Appellant.

UNPUBLISHED

May 22, 2007

No. 269693

Delta Circuit Court

LC No. 05-007481-FH

Before: Schuette, P.J., and O'Connell and Davis, JJ.

PER CURIAM.

Defendant was tried before a jury and convicted of felonious assault, MCL 750.82(1), and possession of a firearm during a felony (felony-firearm), MCL 750.227b. He was sentenced to 23 to 48 months in prison on the felonious assault conviction, and to a consecutive two years in prison on the felony-firearm conviction. He appeals as of right. We affirm.

I. FACTS

Defendant's conviction arose from an altercation with his live-in girlfriend. During the altercation, defendant held a pistol to his girlfriend's head and threatened to kill her. The girlfriend's 13-year-old son witnessed the incident and called 911. The police officers responding to the call found the girlfriend and her son walking away from defendant's home, carrying some belongings. The police surrounded defendant's home, and eventually defendant surrendered peacefully.

At trial, both the girlfriend and her son testified against defendant. The girlfriend testified that the altercation arose in part from defendant's alcohol consumption. According to the girlfriend, approximately two months before the incident, she and defendant had made an agreement not to consume alcohol. She testified that she had abided by the agreement, but that on the day of the incident, defendant had consumed a considerable amount of beer. Defendant sought to discredit her testimony by proffering testimony that the girlfriend had not abided by the purported agreement. The prosecutor objected to the proffered testimony on MRE 608 grounds. The trial court sustained the objection.

II. ADMISSIBILITY OF EVIDENCE

Defendant argues that the trial court's evidentiary ruling was error warranting reversal. We disagree.

A. Standard of Review

"We review evidentiary decisions for abuse of discretion." *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001).

B. Analysis

In general, a party cannot use extrinsic evidence to impeach a witness. MRE 608(b). Extrinsic evidence on collateral matters is excluded "to avoid the waste of time and confusion of issues that would result from shifting the trial's inquiry to an event unrelated to the offense charged." *People v Guy*, 121 Mich App 592, 604; 329 NW2d 435 (1982). Here, the girlfriend's alcohol consumption was a collateral matter unrelated to the charges against defendant. As such, defense counsel could not use extrinsic evidence to challenge the veracity of the testimony about abstaining from alcohol. The trial court was within its discretion in excluding the proffered testimony.

III. SENTENCING

Defendant also challenges the trial court's sentencing decision, claiming that the court should not have scored 50 points for offense variable seven (OV 7). We disagree.

A. Standard of Review

Defendant's argument presents a question of law, which we review de novo. See *People v Babcock*, 469 Mich 247, 268; 666 NW2d 231 (2003).

B. Analysis

A trial court is to score 50 points for OV 7 if "[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(a). Defendant argues that OV 7 should be scored only when the defendant's conduct exceeds the conduct required for the underlying offense.

In support of his argument, defendant cites opinions in which this Court affirmed the application of OV 7 for conduct that exceeded the elements of the sentencing offense. See, e.g., *People v Mattoon*, 271 Mich App 275, 276-277; 721 NW2d 269 (2006); *People v Wilson*, 265 Mich App 386, 396-398; 695 NW2d 351 (2005); and *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). Although this Court affirmed the sentences in those cases, the cases cannot be construed to establish a rule concerning the depth or breadth of OV 7. Rather, the extent of OV 7 is defined in the statute. MCL 777.37.

Our Supreme Court rejected a similar argument regarding OV 3 in *People v Houston*, 473 Mich 399; 702 NW2d 530 (2005). In *Houston*, the defendant argued that there is a legislative policy of "not assessing points for factors that are inherent in the elements of the offense for which the defendant is being sentenced." *Id.* at 409. The Court disagreed, based on the language of OV 3. As the Court explained, the OV 3 statute mandates assessment of the highest number

of points for the applicable factors. *Id.* at 405, citing MCL 777.33. All of the statutory factors are to be considered unless the statute expressly excludes factors that are elements of the sentencing offense. *Id.* at 410. The *Houston* Court's reasoning applies equally to OV 7. Accordingly, OV 7 requires assessment of the maximum number of points regardless of whether the OV 7 factors are the same as elements of the sentencing offense.

Here, the victim's son testified that when defendant put the gun to his mother's head, he said, "I'm going to kill you." The victim testified that as the gun was pointed at her head, she thought she was "a goner." Based on this evidence, the trial court did not err in assessing 50 points for OV 7.

Affirmed.

/s/ Bill Schuette
/s/ Peter D. O'Connell
/s/ Alton T. Davis